

Chu (Migration) [2017] AATA 2342 (10 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Quoc Dao Chu
CASE NUMBER:	1619778
DIBP REFERENCE(S):	CLF2013/61973
MEMBER:	Justin Owen
DATE:	10 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 10 November 2017 at 2:11pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine spousal relationship – Lack of joint finances – Major discrepancies in supporting witness statement – Lack of information for social aspects of relationship

LEGISLATION

Migration Act 1958, ss 5F, 65, 359AA, 376
Migration Regulations 1994, r 1.15A, Schedule 2, 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 November 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 15 March 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221 of Schedule 2 to the Regulations.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate found the parties were not in a genuine and continuing relationship.
4. The applicant appeared before the Tribunal on 17 October 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Linda Duong and witness Mr Viet Hung Chu. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties are in a spousal relationship as defined by cl.801.221(2) in Schedule 2 to the Regulations.
8. The Tribunal has taken into account all the evidence in the Departmental file CLF2013/61973 and the Tribunal's case file 1619778 and the oral evidence given by both parties and the witness at the Tribunal's hearing.
9. A certificate regarding the Tribunal's discretion to disclose certain information under s376 of the Migration Act was included in the Departmental file. The Certificate is valid. The folio in question contained private information regarding the sponsor of the application. The Tribunal utilised its discretion to inform the review applicant of the existence of the s376 certificate and provided a copy of the certificate to the review applicant's representative. The Tribunal advised that the information contained was not relevant to the review and would be given no weight.
10. **What is the background of this case based on all the evidence before the Tribunal?**
11. The review applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on 15 March 2013, on the grounds of being in a spousal relationship with an Australian citizen, eligible

sponsor Linda Duong. The review applicant and the sponsor claim to have met on 2 September 2012 and committed to a shared life together to the exclusion of all others on 12 January 2013. They were married on that same day. A subclass 820 visa was granted to the review applicant on 17 April 2014. A request for further information pertaining to the subclass 801 visa was sent by the Department to the review applicant's migration agent on 16 January 2015. A response to this request was received on 4 September 2015. A request for further documentation was sent to the review applicant's migration agent on 20 June 2016. A response to the request was received on 29 August 2016. The application for a subclass 801 visa was refused on 17 November 2016. An application for review of the decision to refuse to grant the visa was received by the Tribunal on 23 November 2016.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

12. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties have known each other since September 2012 and were validly married on 12 January 2013. The validity of their marriage is not in dispute. They have provided their marriage certificate as evidence. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

15. The Tribunal must consider all the circumstances of the relationship (including the matters specified in r.1.15A in determining whether the parties are in a 'married relationship' as defined by s.5F(2).

16. Financial aspects of the relationship

17. In relation to the financial aspects of the relationship between the review applicant and the sponsor the Tribunal has considered the joint ownership of real estate or other major assets; joint liabilities; the extent of pooling of financial resources; and any legal obligations owed to the party; and any sharing of day-to-day household expenses.

18. The review applicant stated in oral evidence that the sponsor manages the financial aspects of the relationship. He states that he is working between 7am and 3pm Monday to Saturday as a tiler. No corroborative documentary evidence of this was provided. The sponsor stated she is working five days a week at a duty free shop at Kingsford-Smith aerodrome.
19. The parties claimed in their written submission to pay the sponsor's parents about \$300 a week for boarding and meals. They claim to pay the electricity costs for the family. No corroborative written evidence was provided to the Tribunal to substantiate these claims.
20. The parties provided a statement from their joint Commonwealth Bank account for the period 11 July 2017 to 10 October 2017. The Tribunal notes that regular salary payments are being made from the personal account of the review applicant to the joint account. The Tribunal further notes that this is Statement number 21, suggesting the account has been in operation for a considerable period of time. The Tribunal puts some positive weight on this account. Nevertheless the Tribunal notes that the vast majority of transactions in the accounts are transfers and the account is largely being used for transport costs such as petrol and a travel ticket rather than as an everyday account. The review applicant states however that the joint account is used for daily transactions. The review applicant has provided a statement from the sponsor's own personal Commonwealth Bank account for the period 2 March 2017 to 1 June 2017 which illustrates, in the Tribunal's opinion, the sponsor is using her own personal account rather than the joint account for daily living expenses.
21. The Tribunal asked both the review applicant and the sponsor if they had made any major purchases either as a couple or individually. The review applicant stated to the Tribunal his wife had purchased a new white Toyota Lexus around the end of 2015, paying between \$40,000 and \$50,000 for the vehicle. The Tribunal subsequently asked the sponsor if she had made any major purchases during this period. She replied no. The Tribunal asked if she had purchased a motor vehicle. She stated she had not.
22. The Tribunal raised this discrepancy in evidence with the review applicant under S.359AA., inviting the review applicant to comment on or respond to this information which the Tribunal considered would, subject to the review applicant's comment or response, be the reason or part of the reason for affirming the decision under review.
23. On 27 October 2017 the review applicant replied via their representative, stating *'It is true that a brand new Lexus has been bought for \$45,000, but it is the sponsor's father's car, in the name of the father, not the sponsor 'Linda'. Linda contributed about half the purchase price, being \$20,000 provided so she can use the car to go to work. Dao knows that his wife contributed a large sum of money, and she can use the car everyday to go to work, so he treats the car belongs to his wife.'* The Tribunal notes the certificate of registration that has been provided subsequently by the review applicant. The Tribunal nevertheless is unconvinced by this explanation for the misapprehension. The review applicant claims he is making \$500 per week and the sponsor \$800 per week in income. Previously, as stated by the sponsor in a statutory declaration to the Department, the review applicant was not in gainful employment. \$20,000 therefore is not in the Tribunal's mind an insignificant amount of money for a couple in the financial situation of the review applicant and the sponsor. The failure of the sponsor after specific questioning to recall such a major expense the Tribunal finds implausible.
24. **Nature of the household**
25. In relation to the nature of the household, the Tribunal has considered living arrangements; housework; evidence of joint utilities accounts; joint responsibility for day-to-day living expenses; and correspondence addressed to both partners at the same address.

26. The Tribunal notes that the parties claim to be living with the parents of the sponsor as well as her brother. The review applicant said that housework at the home was principally done by his mother-in-law but both he, the sponsor and her brother made a contribution.
27. In the review applicant's written submission to the Tribunal it was claimed that he and the sponsor pay the electricity costs for the family. No corroborative evidence of any bill in their names was however presented in evidence. The Tribunal therefore gives this assertion no weight.

28.

29. **Social aspects of the marriage**

30. In relation to the social aspects of the marriage, the Tribunal has had regard to the witness testimony at the hearing along with the evidence presented on the Departmental and Tribunal files.
31. At the hearing the witness Viet Hung Chu gave evidence to the Tribunal as to the genuineness of the relationship between the review applicant and the sponsor.
32. The Tribunal notes that the witness had previously provided a Form 888 supporting witness declaration to the Department dated 3 September 2015, stating he had known the review applicant for six years and alternatively the contradictory statement that he had first met the review applicant at that time eighteen months earlier. This error was subsequently repeated on 20 July 2016 in a further Form 888 declaration when the Department made a request for further information.
33. In oral evidence to the Tribunal the witness stated that the review applicant was his cousin. He stated that he had picked up the review applicant at the airport when he arrived in Australia in 2009. He stated that the review applicant had then lived with him and his family for his first six months living in Australia. The review applicant subsequently moved out. The witness said he kept contact about annually with the review applicant. The review applicant claimed to have attended the wedding of the review applicant and the sponsor.
34. The Form 888 signed by the witness on 3 September 2015 in response to the question how he knew the applicant and the applicant's partner or fiancée stated *'I met Quoc Dao Chu the applicant about 18 months ago in a pharmacy store located on the ground floor of Centro Bankstown shopping mall. While I was paying for my medication at the cashier, he approached and explained his wish for getting help in asking the retailer about the cold and flu medicine for his wife because his English wasn't good enough for that. Hearing his Vietnamese accent, I know he's from Nghe An province like me, therefore, I turned my head back to him and saw that he's worried and quite embarrassed. I tried to encourage him by making a small joke as saying to him 'you are too young for marriage'. He smiled and replied to me sincerely and politely 'please help me. My English is so bad that I don't know how to ask for the right medicine for my wife. She suffered a serious cold last night and seemed not getting any better this morning. I'm appreciated very much for your help.' Knowing the reason for his worry, I not only assisted him with looking for the medication but also helped to translate its usage instruction for him. He said thank you to me again and asked me my phone number for inviting me to go eating with him and his wife. When she's getting well as a way to show their sincere appreciation for my assistance. A few days later, as appointed, we went to have lunch together in Pho Au restaurant. We're all very glad for knowing each other and that we have the same background and hometown. After that day, we occasionally go for café and/or eating, usually weekends and also gather for BBQ party in some special events.*

35. The Tribunal raised these major discrepancies and contradictions in the evidence of the witness with the review applicant under S.359AA., inviting the review applicant to comment on or respond to this information which the Tribunal considered would, subject to the review applicant's comment or response, be the reason or part of the reason for affirming the decision under review.
36. On 27 October 2017 the review applicant replied via their representative, stating *'At the hearing Hung stated that Quoc Dao Chu ('Dao') is his remote cousin where Dao's grandfather and Hung's grandfather are brothers. Hung's grandfather left the Middle of Vietnam for the North very long time ago, and Dao's grandfather remained in the Middle, for this reason Hung and Dao did not know each other until 2009 when Dao came to Australia as an overseas student, through the family arrangement Dao stayed with Hung. Dao left Hung 6 months later. During the time they lived apart they rarely met or contacted each other as Dao changed address and phone number on a number of times. Finally they met each other at a Chemist in Bankstown Central.'*
37. The Tribunal finds this explanation entirely unconvincing. The Tribunal notes the review applicant and the witness have conceded – both in the written submission provided to the Tribunal on the day of the hearing on 17 October 2017 and in their response to the questioning under s.359AA - that they cohabitated the first six months after the review applicant's arrival in Australia in 2009. The Tribunal further notes that the witness in oral evidence stated he had attended the wedding of the review applicant and the sponsor. The wedding was held on 12 January 2013. On the basis of the 888 Form of the witness he first met the review applicant 18 months before signing the form in September 2015 – meaning early to mid-2014.
38. The review applicant through their representative has tried to draw a distinction between when the witness 'knew' and 'met' the review applicant. The Tribunal finds the distinction irrelevant to this matter. The review applicant and the witness agree in evidence that they met in 2009 and lived together for six months. The witness stated in oral evidence to the Tribunal he attended the wedding of the review applicant and the sponsor that occurred in January 2013. In his Form 888 he has claimed he did not meet the review applicant until around (based on his '18 months ago' assessment) early to mid-2014 in a chemist. The Tribunal is of the very firm view that the testimony of the witness in his Form 888 of 3 September 2015 is written from the perspective of someone that met the review applicant for the very first time at the chemist. The contradiction is stark and obvious.
39. The Tribunal is of the opinion that the evidence of the witness is fanciful and lacking in credibility. The Tribunal gives this evidence no weight. The Tribunal is very concerned about what are significant inconsistencies in evidence and raises grave questions as to credibility.
40. The Tribunal notes that the review applicant has provided three times – to the department twice and to the Tribunal - a character witness who has proven from his testimony to be an unreliable witness on each occasion.
41. In oral evidence the review applicant and sponsor stated they had declared their relationship to the Department of Human Services and other government bodies after marriage. No corroborative written evidence was provided to the Tribunal confirming this.
42. The Tribunal asked the parties who each other's best friends were. The review applicant stated the sponsor's best friends were Hong and Huong. When the sponsor was questioned as to who her best friends were, she said she couldn't remember. Under S.359AA. the Tribunal invited the review applicant to comment on or respond to this information which the Tribunal considered would, subject to the review applicant's comment or response, be the reason or part of the reason for affirming the decision under review. In response the review

applicant through their representative stated *'Linda instructs that she has many friends among them are Hong and Huong (as Dao stated) – all her selected friends are good who ever is not good, is not her friend – she does not treat any particular friend as the best.'*

43. The parties illustrated in oral evidence some knowledge of each other's immediate family members.
44. The Tribunal enquired as to their social activities such as the celebration of each other's birthday. The sponsor stated that generally they didn't celebrate birthdays. The review applicant stated that the sponsor had suggested a celebration for his last birthday, but he had instead stated no, he needed to find employment instead.
45. The parties have not travelled overseas together since marriage. The review applicant returned to Vietnam in February 2017 to visit his grandparents.
46. The Tribunal enquired of the review applicant as to photographs of himself and the sponsor as a couple socially. In oral evidence the review applicant responded that he didn't like to be photographed but the sponsor had told him they would need to take photos to provide them as evidence for the purpose of the hearing. The Tribunal asked the review applicant if he had any photographs of him and the sponsor with family, friends and others on his mobile telephone. The review applicant said no, they didn't use mobile telephones for photographs, instead they used a mini-camera.
47. The sponsor however in response to the Tribunal's subsequent questioning specifically stated that they did not use any sort of mini camera for photographs but instead used their mobile telephones.
48. The Tribunal raised this contradiction in the evidence each party gave with the review applicant under S.359AA., inviting the review applicant to comment on or respond to this information which the Tribunal considered would, subject to the review applicant's comment or response, be the reason or part of the reason for affirming the decision under review.
49. On 27 October 2017 the review applicant replied via their representative, stating *'They have a small canon camera, previously they often used that camera to take photos. They now have an I phone 6 plus. It takes photos a lot better than the old camera, so when they go out, they often bring along the camera for "just in case" but never used.'* The Tribunal notes the oral evidence of the review applicant of photographs being specifically taken for the purposes of the Tribunal hearing. The Tribunal is not satisfied with the explanation for the contradictory evidence concerning the camera by the parties. The Tribunal submits that whether they were using a camera or a mobile telephone for their photographic needs was a basic statement of fact.
50. The Tribunal has considered the photographs the review applicant has provided. 18 photographs were provided to the Tribunal at the hearing of 17 October 2017. The majority are of the review applicant and sponsor together with no other parties.
51. Referring to the delegate's decision, the Tribunal enquired as to why the review applicant had failed to respond to the Department's request of 20 June 2016 for the submission of further Form 888 supporting witness statements from both his parents and the sponsor's parents. The Tribunal noted that no explanation had been made for this. The Tribunal also noted that the parties both claimed to be living with the sponsor's parents, making the acquisition of at least one of the statements readily accessible.
52. The review applicant stated that he believed he and the sponsor were a genuine couple and therefore didn't need to provide this. Such a request was unusual. The sponsor stated in

oral evidence that they had provided a 888 Form from her brother instead due as his English was better than her parents. The Tribunal pointed out that translators are available. The Tribunal is not convinced by explanation of the parties for the extended unavailability of these supporting statements.

53. The Tribunal notes that 888 Forms were provided at the hearing of 17 October 2017 by the sponsor's father Viet Thang Duong and the review applicant's father Chu Van Hai. The statement of the sponsor's father says that the review applicant and his daughter are sharing a room at his house and have been married and living together for five years. He states that he hopes to see them have a child soon and has offered to take care of the baby. The signed statement from the review applicant's father states that he and his wife met the sponsor in 2012. The Tribunal gives the statements some positive weight.
54. The Tribunal asked the parties about their socialising on weekends. The Tribunal enquired as to what they had done on the 'previous Sunday' (nine days prior to the hearing). The review applicant stated that they had spent the Sunday at home and had gone shopping. The sponsor in questioning stated she had spent the day working at the airport. The Tribunal raised this contradiction in the evidence each party gave with the review applicant under S.359AA., inviting the review applicant to comment on or respond to this information which the Tribunal considered would, subject to the review applicant's comment or response, be the reason or part of the reason for affirming the decision under review.
55. On 27 October 2017 the review applicant replied via their representative, stating '*Linda worked, she came home about 4pm and both went shopping. We note 4pm during the saving time period is still very early – Dao mistakenly thought Linda does not go to work on that Sunday.*' The Tribunal accepts there is a possibility that the review applicant did make an honest error with his recollection.
56. The Tribunal is troubled by the lack of evidence that has been provided by the review applicant. The lack of any further witnesses to corroborate the testimony of the review applicant gives the Tribunal relatively little substantive information to consider concerning the social context of the relationship at the time of decision.

57. Nature of the commitment of the relationship

58. In respect of the parties' commitment, they claim to have been together as a couple and living together for over four years.
59. When asked by the Tribunal about their vision for the future, the review applicant stated that they would be together for a long time and hoped to move out next year. He stated they hoped to have two children. This evidence was reflected in that given by the sponsor.
60. The Tribunal enquired of the review applicant if there were any evidence of email or social media communication between himself and the sponsor over the time of the relationship it could consider. He stated they communicated via telephone calls and texting. No evidence as such was provided to the Tribunal beyond the oral testimony.

61. Conclusion

62. Having considered the evidence as a whole the Tribunal is unconvinced that the relationship between the review applicant and the sponsor meets the relevant criteria under the Act. Whilst the Tribunal concedes the parties are well acquainted, the Tribunal remains very concerned about a wide number of inconsistencies in evidence, the lack of credibility of their principal witness and was unable to be satisfied on the evidence presented that the parties are in a spousal relationship for the purposes of s.5F(2).

63. On the basis of the above, the Tribunal is not satisfied that at the time of decision the review applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others; that the relationship is genuine and continuing; and they are living together or not living separately and apart on a permanent basis. They therefore do not meet the requirements of s.5F(2)(b), s.5F(2)(c) and s.5F(2)(d) for a married relationship

64. Findings

65. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c).
66. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
67. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

68. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justin Owen
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).